No. 14629

IN THE

United States Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellant,

vs.

CLARA STINTZI, Guardian ad Litem for Gerald Stintzi, a minor,
Appellee.

No. 14629

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

HON. SAMUEL M. DRIVER, *Judge*

APPELLANT'S REPLY BRIEF

LEO N. CASHATT
JEROME WILLIAMS
FRANCIS J. McKEVITT
1121 Paulsen Building
Spokane, Washington
Attorneys for Appellant.

FILED
MAY 11 1955
PAUL P. O'BRIEN, CLE

NATIONAL PRINTING CO. 68414

No. 14629

IN THE

United States Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellant,

vs.

CLARA STINTZI, Guardian ad Litem for Gerald Stintzi, a minor,
Appellee.

No. 14629

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

HON. SAMUEL M. DRIVER, *Judge*

APPELLANT'S REPLY BRIEF

LEO N. CASHATT
JEROME WILLIAMS
FRANCIS J. McKEVITT
1121 Paulsen Building
Spokane, Washington
Attorneys for Appellant.

NATIONAL PRINTING CO. 68414

INDEX

Page

I.

THE FACTS 1

II.

WAS STINTZI AN INVITEE?
(Appellee's Br. pp. 12-28) 8

III.

APPELLEE'S ANSWER TO SPECIFICATION OF
ERROR VI (Appellee's Br. pp. 34-36) 17

IV.

APPELLEE'S ANSWER TO SPECIFICATION OF
ERROR VIII (Appellee's Br. pp. 40-41) 19

V.

CONCLUSION 20

TABLE OF CASES

Page

Atherton vs. Tacoma R. & P. Co., 30 Wash. 395, 71 Pac. 39 18

Chicago I. & L. R. Co. vs. Pritchard, 168 Ind. 398, 79 N.E. 508 15

Cowie vs. Seattle, 22 Wash. 659, 62 Pac. 121 18

Danielson vs. Carstens Packing Co., 121 Wash. 645, 210 Pac. 12 18

Davis vs. Falconer, 159 Wash. 230, 292 Pac. 424 18

Great Northern vs. Thompson, 199 Fed. 395 14

Hansen vs. Lehigh Valley Ry. Co., 120 Fed. (2d) 498 20

Imler vs. Northern Pacific Ry. Co., 89 Wash. 527, 154 Pac. 1086 .... 9, 14

Northern Pacific Railway Co. vs. Mely, 219 Fed. (2d) 199 12

Price vs. Gabel, 162 Wash. 275, 298 Pac. 444 18

Rainier Heat & Power Co. vs. Seattle, 113 Wash. 95, 193 Pac. 233 18

Spurrier vs. Front St. Ry. Co., 3 Wash. 659, 29 Pac. 346 18

1. THE FACTS

We are deeply concerned with the liberties which have been taken with the record in appellee's brief and the great extent to which statements are made therein which are wholly unsupported by the record, notwithstanding parenthetical page references to the record purportedly supporting such statements. In view of the many such instances in appellee's brief, it will be impossible to detail each one of these inaccuracies within the permissible limits of this reply brief. We therefore most respectfully urge this Court to refer to the entire printed record for the purpose of determining what the evidence disclosed. We will now refer to some of the more glaring examples of unsupported statements in appellee's restatement of the case.

Appellee says at page 4, "For at least 10 years it had been the *accepted practice* of Addison-Miller employees to dump this slush ice, salt sacks and other debris on the dumping ground north of track 13." No witnesses testified as to any such *accepted practice*, and the use of this phrase is wholly without support or license, either in the transcript references appended to this statement by appellee, or elsewhere in the record. Mr. Fincher, the Addison-Miller foreman, testified that the Addison-Miller employees had, to an undisclosed extent, been dumping such items north of Track 13 for at least 10 years on their own initiative, but he never said or inferred that such practice was *accepted* by appellant railway company, nor is there any evidence in the record or evidence justifying an

inference that appellant railway company ever knew of such practice or countenanced it in any way. The use of the word "accepted" is doubtless intended to imply to this Court that appellant knew of such practice and acquiesced in it, notwithstanding the utter absence of any evidentiary basis for such a finding.

On page 4 appellee says, "it is admitted that the presence of this material on the dumping ground could only mean that it was carried there across track 13 by Addison-Miller employees (Tr. 790)." The foregoing transcript reference is a part of the testimony of James Crump, appellant's assistant yardmaster. He had just testified that he had no knowledge whatsoever that Addison-Miller Co. ever dumped anything across and north of Track 13 (Tr. 788-790). He was then asked by appellee's counsel,

> "Q. You don't recall. Well if you had seen that, the presence of slush ice in that common dumping ground over this 15 years of your experience prior to 1952, you knew and realized that to get that ice there from the slush pit in the icing dock, someone had to carry it across track 13 to that dumping ground, did you not?
>
> A. Yes, it would have to be carried by someone."

This question and answer were purely argumentative. We do not deny that Addison-Miller employees had been dumping across Track 13 and that to do so they would have to carry the material across the track, but we do say that there is absolutely no evidence that appellant, or any of its lowliest employees for that matter, ever had any knowledge thereof. Again this statement would seem to represent an in-

tent to imply something to this Court which is wholly without basis in the record.

At pages 5 & 6 appellee says, "A sure indication as to whether Addison-Miller employees were working on or about the icing dock *and tracks 12 and 13* during hours of darkness was the illumination of the overhead lights on the icing platform." The foregoing statement is reiterated in various places throughout appellee's brief but is not supported by any reference to the transcript and is without support in the record. There was testimony by Northern Pacific employees that the illumination of the overhead lights on the icing platform would indicate to them that Addison-Miller employees were working on or about the icing dock, but no one testified that the illumination of the overhead lights would indicate that any Addison-Miller employee was working *on Tracks 12 and 13.* We are certain that the Court will understand that there is a vast difference between knowledge that employees were working on and about the ice dock and knowledge that employees were working on the railroad tracks. As a matter of fact, there is absolutely no evidence in the record that any Northern Pacific employee ever knew that Addison-Miller employees ever worked under any circumstances on Tracks 12 and 13 or any other track in the yard. On the contrary, the record discloses that, so far as appellant was aware, Addison-Miller employees had no occasion to ever be on any of the trackage. It is quite true the illumination of the overhead lights on the icing platform would tend to indicate that the Addison-Miller

men were doing some work about the dock, but such knowledge would constitute no reason for appellant's employees to be apprehensive as to their possible presence on trackage or on or about cars standing on the tracks.

At page 6 appellee says, "A refrigerator train for icing was due in the yard at 9:35 p.m. (Tr. 594) and another fruit train was due at 11:30 p.m. (Tr. 793)." At page 594 of the record one of appellant's employees, Gordon Williams, was asked on cross-examination when, after 7:00 p.m., the next train arrived that had cars to be iced, and he answered, "What time did that train come in? I can't recall. 9:35 wasn't it?" He had already testified on direct examination by reference to railroad records that in the train that arrived at 9:35 p.m. there were no cars to be iced, and that following 7:00 p.m. the next train that came in that had any cars to be iced was one arriving at 11:35 p.m. with one icer in the train (Tr. 582). The other transcript reference relied upon by appellee in support of the above statement is page 793. There, the witness Crump testified that after 7:00 p.m. the next train that came in with a car to be iced was at 11:30 p.m. and that there were no cars to be iced out of the 9:35 train. Appellee's statement that a refrigerator train for icing was due in the yard at 9:35 p.m. appears to represent an attempt to afford basis for arguing that appellant and its employees should have known at the time of the accident that Addison-Miller employees would be busily engaged in preparing to ice the alleged 9:35 train, and appellee does so argue elsewhere in his brief. The record conclusively shows

that after 7:00 p.m. there were no cars to be iced until 11:30 p.m.

At page 7 appellee says, "Some time around 7 p.m. Stintzi, Allen Maine and Ray Davis, left the premises for supper. On their return to the icing platform they were advised that ice had become caked up *and trouble had occurred in the conveyor belt* near the slush pit or sump (Tr. 186, 790)." There is no support in the record for the underlined portion of the statement. This statement is a sort of half-truth derived from the following testimony of appellee Stintzi at pages 185 & 186 of the record.

> "Q. Did you know where it was that you were supposed to work? A. Yes. Q. How did you know that? A. He said near the pulley where the ice was caked up and it is downstairs where they were having trouble, and so — then he said to go down there and so on."

The foregoing is the sole support in the record for any claim that there was any trouble, and there is nothing in the record to indicate what the alleged trouble was or whether it in any way interfered with the operation of the plant or conveyor system.

At page 7 appellee says, "Another part of the crew was instructed to unload salt from a salt car then spotted in a line of cars on track 13 opposite the salt pit." This statement is wholly without support in the record, either in any of the many transcript references appended by appellee, or otherwise. There is absolutely no testimony in the record that any of the Addison-Miller employees were instructed to unload salt from the salt car. Even Stintzi and Allen Maine never so testified, the limits of their testimony being

that when they were carrying the buckets of ice beneath the couplings of the freight cars, they noticed that a salt car was being unloaded to the east. Stintzi's friend, Ray Davis, only testified that he was instructed by Fincher to "work in the salt pit" (Tr. 317-318). Foreman Fincher testified positively that there was no salt car being unloaded at the time, and when he instructed Stintzi and the others to carry out the slush ice he did not then have any knowledge that there were even any cars on Track 13 (Tr. 722). Again we say that neither Stintzi nor Allen Maine nor Ray Davis, nor any other Addison-Miller employee, or anyone else, ever testified that a part of the crew was instructed to unload salt from any alleged salt car then spotted on Track 13.

At page 8 appellee says that Stintzi and Maine were directed by Fincher to dump the slush ice north of Track 13, and then says, "The foreman, Fincher, knew there was a string of cars on track 13 (Tr. 722)." There is an utter absence of any evidence that Mr. Fincher, when he instructed Stintzi and Maine to dump the slush ice, knew that there was a string of cars on Track 13. At page 722 of the record, Mr. Fincher categorically denies that he knew that there were any cars on Track 13 when he so instructed Stintzi and Maine, and he testified that he didn't know of the presence of the cars until later when he went outside of the building and then saw cars there and saw Stintzi and Maine carrying the buckets of ice beneath the couplings, and then told them that they should not do this because of its danger and should go around the end of the cars (Tr. 722, 720,

719). The quoted statement is wholly unsupported elsewhere in the record, and even Stintzi and Maine did not presume to so testify.

On pages 9-10, and also on page 11, appellee again reiterates the statement that the illumination of the overhead lights on the icing platform was a certain indication that Addison-Miller employees were working *on the tracks.* We have already discussed this wholly unwarranted and unsupported statement.

At page 11 appellee says that a loud speaker system and telephone communication system "had previously been used to advise Addison-Miller employees of the movement of cars (Tr. 397-402)." The foregoing transcript reference does not support this statement nor is it supported elsewhere in the record. There is absolutely no evidence that the loud speaker system or the telephone communication system had ever been used or was ever intended to be used to advise Addison-Miller employees of the movement of cars. At pages 397 to 402 of the record and also at page 415 appellant's switch foreman, Mr. Prophet, only testified that the loud speaker system was on occasion used to advise switchmen of the movement of cars and he at no time testified that it had ever been used to advise or warn Addison-Miller employees.

2. WAS STINTZI AN INVITEE? (Appellee's Br. pp. 12-28)

At pages 12 to 28 of his brief, appellee seeks to contend that the question of whether appellee was an invitee was properly left to the jury for determination. We freely concede that the question of whether one's status is that of invitee, licensee, or trespasser is, as with all other factual questions, ordinarily for the determination of the jury. Countless cases can be found so stating. But that, of course, does not mean that it is always a question for the jury, and it is our position that this is the exceptional case where, upon the undisputed facts, this Court can and should say that as a matter of law appellee was not an invitee and so cannot recover in this action.

First, viewing appellee's argument in this respect in its entirety. In the conclusion to appellee's brief, the argument on this point is summed up as follows: Stintzi, in crossing Track 13, was acting by virtue of an implied invitation established by continuous usage of the common dumping ground north of Track 13 over a period of 10 to 26 years and by appellant's acquiescence in such practice; and it is contended that the Court should so hold as a matter of law or at least a jury should be permitted to so find.

It is quite true that it was the testimony of the Addison-Miller foreman, Mr. Fincher, that for a number of years Addison-Miller employees had been dumping some empty salt sacks, slush ice and other debris north of Track 13. We should point out, however, that there is no evidence of how much dumping was

involved in this practice. There is no evidence as to on how many occasions slush ice was dumped north of Track 13. Mr. Fincher testified that he only had occasion to do this two or three times in his experience. He did say that slush ice was more frequently dumped during the daytime shift than on his shift, but he was not asked to nor did he estimate how frequently this had occurred on the daytime shift, and no other witness testified on the subject. Likewise, there was testimony by Mr. Fincher that in the four or five years since paper salt sacks were used that these were customarily disposed of north of Track 13, but again Mr. Fincher was not asked to nor did he undertake to estimate how frequently this would occur or how many salt sacks were involved. There was no showing at all of what other debris might have been dumped there by Addison-Miller employees or how frequently.

We now come to the statement in the conclusion of the brief as to "appellant's acquiescence in such practice." Also at page 28 appellee says, "This continuous usage of itself establishes appellant's acquiescence in it." This statement seems to be the meat of appellee's position, but appellee points to no authority to support such a contention. In fact the law, particularly in Washington, is directly to the contrary.

In *Imler vs. Northern Pacific Ry. Co.,* 89 Wash. 527, 154 Pac. 1086, the Court denied recovery as to one who was crossing railroad trackage along a footpath which the evidence disclosed had been long and customarily used by the public. The Court said:

"Under such circumstances, it has been held that a use, however long continued, will not imply a license. *Burg v. Chicago R.I.&P. Co.,* 90 Iowa 106, 57 N.W. 680, 48 Am. St. 419; *Ward v. Southern Pac. Co.,* 25 Ore. 433, 36 Pac. 166, 23 L.R.A. 715. And such would seem to be the logical result of the opinion of this court in the case of *Hamlin v. Columbia & Puget Sound R. Co.,* 37 Wash. 448, 79 Pac. 991, and *Dotta v. Northern Pac. R. Co.,* 36 Wash. 506, 89 Pac. 32."

There is a vast difference between knowledge and acquiescence. Possibly a long-continued use of a way across railroad tracks might be sufficient to warrant an implication of notice or knowledge thereof to the railroad company, but even this only if such use was so regular and frequent and so obvious as to warrant an inference that it was known to the railway. However, no such situation exists here. As before pointed out, there is no evidence as to how frequently or extensively Addison-Miller employees crossed Track 13. A glance at exhibits 10 and 12 will show that the area between Tracks 13 and 14 for many hundreds of yards, not only along the Addison-Miller icing dock, but far beyond it, was filled with the debris cleaned from appellant's cars. It is highly unlikely, even though Addison-Miller employees were occasionally dumping salt sacks or slush ice among the other debris, that such would be noticed or known to appellant's employees and most certainly it was not likely to be known by appellant's supervisory personnel so as to charge appellant with knowledge thereof. At most, the record here shows an infrequent and sporadic crossing of Track 13 and nothing from which it might be reasonably inferred that appellant knew

about it. Moreover, even if appellant did *know* about it, the *Imler* case is authority for the proposition that such would not constitute an *acquiescence* in such practice or a *license* so to do, and most certainly not an invitation.

The Court's attention is now directed to the phrase, "common dumping ground," to which appellant referred in its opening brief and to which appellee has constantly referred in his brief. This phrase had its origin in the cross-examination by appellee's counsel of the witnesses Corrigan and Crump, appellant's yardmaster and assistant yardmaster respectively. As to Mr. Corrigan, appellee's counsel asked ,"Then Mr. Corrigan, from your long experience out there at the yard, you were familiar with the fact that immediately to the north of track 13 and between track 13 and track 14 there is a common dumping ground? A. Yes." (Tr. 547). The witness Crump was likewise asked, "Q. And you are familiar with the fact, as is shown on Exhibit No. 12 here, that immediately to the north of track 13 there was a common dumping ground? A. That's right." (Tr. 788). Both of these witnesses were immediately thereafter asked whether they had ever seen or knew of the dumping of slush ice and salt sacks in that area by Addison-Miller Co., and both of said witnesses categorically denied ever having seen such a thing or knowing thereof.

The foregoing is the only manner in which the phrase "common dumping ground" came into the record. Neither Mr. Corrigan nor Mr. Crump, nor any other witness, on their own initiative ever so characterized the area between Track 13 and Track 14. Both

Mr. Corrigan and Mr. Crump subsequently explained that the area was a common dumping ground only to the extent that it was used by Northern Pacific employees as an area to dispose of debris cleaned out from freight cars placed on Track 14, which was designated in the yard as the clean-out track and the north rails of which were slightly elevated above the south rails so that the cars placed thereon would slope to the south, so that debris in the cars could be easily removed onto the area between Track 13 and Track 14 (Tr. 554, 811).

This Court quite recently, in *Northern Pacific Railway Co. vs. Mely,* 219 Fed. (2d) 199, indicated that the answers to such leading questions had little dignity. In that case, a District Court judgment against the railway company was reversed and the action ordered dismissed, and in the course of the opinion it was said,

> "There was no proof here of any nature which indicated a failure of railway to notify Mely that No. 1648 was ahead of him. Under leading questions, the fireman and brakeman testified uncertainly that they were not informed of it."

The phrase, "common dumping ground" was one created by appellee's counsel, and it is quite conclusively shown from the testimony of the witnesses Corrigan and Crump that the area in question was not a common dumping ground in the sense that Addison-Miller employees were ever given any right to dump there but, rather, that it was simply common to the employees of Northern Pacific Railway Company.

We now notice the following specific things appear-

ing in the course of appellee's argument on the invitee question.

The cases cited by appellee at page 14 of his brief simply state the fundamental rule as to who is an invitee. In none of them was there any serious question raised as to the status of the plaintiff and all were clear-cut situations.

At page 16 appellee seeks to have the Court believe that the cleaning of the slush ice by Stintzi and the others at the time in question was absolutely necessary to the continued operation of the dock. There was no such showing made. There was no showing that the operation of the conveyor belt was interrupted or in any danger of being interrupted at the time in question. The only testimony in the record lending some comfort in this respect is his own answer on page 186 of the record, "He said near the pulley where the ice was caked up, and it is downstairs where they were having trouble, and so — then he said to go down there and so on." From this one isolated answer of appellee, his brief throughout seeks to create the impression that there was evidence that there was trouble in the conveyor belt which was interfering with its continued operation. On the contrary, there was no showing as to what trouble he was referring to, and even if the conveyor belt's operation was impaired, the development of such a situation could not be stretched into an invitation to Stintzi to cross Track 13 beneath the couplings of standing freight cars.

At page 19 appellee quotes certain testimony of Mr. Fincher, the Addison-Miller foreman, as being

"the conclusive and ultimate proof that appellant recognized the area north of track 13 as a common dumping ground for Addison-Miller in its ice operation." The testimony quoted in this respect is Mr. Fincher's testimony as to what he told Stintzi and Maine about going around the cars rather than through them. We are completely unable to understand how what Mr. Fincher said in this respect has any bearing upon what appellant railway knew or recognized. Again we say that there is utterly no evidence in the record that appellant railway company ever knew, recognized or intended that Addison-Miller employees should use the area between Tracks 13 and 14 as a dumping ground.

Likewise, there is no evidentiary basis whatsoever for the statement on page 20 of appellee's brief that "these officials knew that the use of the area by Addison-Miller was contemplated by the contracting parties and was reasonably embraced within the work area of Addison-Miller employees (Tr. 547, 788, 789)." The foregoing transcript references used by appellee to support this statement are simply transcript references to the leading questions of appellee's counsel as to the "common dumping ground," which leading questions and answers were heretofore discussed. There is utterly no license in the record for the above-quoted statement, directly or by inference.

Appellee, at pages 21 to 23 of his brief, cites *Great Northern vs. Thompson,* 199 Fed. 395, and *Imler vs. Northern Pacific Ry. Co.,* 89 Wash. 527, 154 Pac. 1086, in support of the statement that "implied invitation arising from the facts in this case has judicial ap-

proval in the State of Washington." We respectfully urge the Court to examine both of the foregoing cases to see for itself whether the *Imler* case furnishes any authority for the quoted statement from appellee's brief. The *Imler* case simply cited *Great Northern vs. Thompson,* 199 Fed. 395, and distinguished it. The *Imler* case denied recovery to one walking along a foot path which people had been long accustomed to using to cross the railroad tracks, saying

> "Under such circumstances, it has been held that a use, however long continued, will not imply a license."

At pages 24 and 25 of his brief, appellee cites and discusses the case of *Chicago I. & L. R. R. Co. vs. Pritchard,* 168 Ind. 398, 79 N.E. 508, and appellee states the facts of that case to be that "an employee of a shipper loading poles on a railroad car went around the end of the car for some purpose which the evidence did not directly disclose, and as a result was struck by a train approaching the area." We urge the Court to refer directly to this case, and it will be found that the facts, on the contrary, were that the employee heard someone shout "Stop that train," and with all the other members of the crew, rushed to the other side of the car where appellant was struck by poles falling off of the car which he and others had been loading, due to a defective hanger on the car, and that the poles by striking his body threw him onto adjacent railroad tracks where he was struck and killed by an oncoming train. He did not go onto the railroad tracks on which he was struck and killed but was thrown onto the tracks by the logs which tumbled from the car by reason of the railroad

company's negligence in furnishing a car with a defective hanger.

We have no quarrel with the statement made by appellee at page 26 that, "the great weight of authority supports the proposition that the invitation extends to those parts of the premises, where the invitee under circumstances and conditions of his invitation would naturally be likely to go; or such premises as would reasonably be embraced within the object of the invitee's visit." The cases cited by appellee at page 26 simply state that fundamental proposition and have no factual similarity with the case at bar. In fact, nearly all of the cases cited at page 26 of appellee's brief recognize that an *unreasonable* or *unexpected* activity is not within an invitation.

At pages 26 to 28, appellee lists by alphabetical letter six items, upon the basis of which appellee says the jury properly found Stintzi to be an invitee. These listed items consist entirely of what Addison-Miller Co. did and what Foreman Fincher instructed Stintzi and Maine to do, and what Stintzi and Main saw as they were about their perilous adventure. Nowhere among these items are there any facts stated as to any knowledge on the part of appellant railway company, or any facts upon which it might be inferred or concluded that appellant railway company had any knowledge as to what was being done. We again say that the only evidence which can establish a permission, and beyond that an invitation, must be of acts or conduct of the appellant railway company, and there is no such evidence in the record.

We again respectfully submit that this Court should hold as a matter of law that Stintzi was not an invitee on appellant's premises at the place of his injury and that the action should in consequence be reversed and ordered dismissed.

3. APPELLEE'S ANSWER TO SPECIFICATION OF ERROR VI (Appellee's Br. pp. 34-36)

This specification of error dealt with the claimed error of the Court in instructing the jury at appellee's request that, even though Addison-Miller Co. was negligent, if the railway company was "guilty of negligence *in any degree*" * * * "which contributed proximately *in any measure* to the injuries sustained by Gerald Stintzi," that the jury's verdict *must* be in favor of Stintzi, "unless you should further find from the evidence that the minor was guilty of negligence which directly and proximately caused the injuries sustained by Gerald Stintzi or substantially contributed thereto" (Tr. 886-887).

Appellee's answer to this claim of error seems to concede that the instruction complained of was faulty, but appellee urges that with the instructions considered as a whole the Court should not hold the error prejudicial.

By way of replying to this contention, we can only ask the Court to consider the instructions as a whole. We are certain it must be concluded that the obvious vice of this instruction cannot be overlooked on that basis. The instruction in question was the heart of the matter. No one seriously contended that Addison-

Miller Co. and its foreman were not largely responsible for this unfortunate accident. This was the instruction that the jury must necessarily have relied on largely to support its verdict against appellant. It is impossible to say afterwards to what extent one or more of the jurors placed undue or heavy reliance on any particular instruction. The criticized instruction clearly imposed different standards of care on the Northern Pacific Railway Company than on Gerald Stintzi.

The Supreme Court of Washington has held to be reversible error language such as "negligence in any degree."

Spurrier vs. Front St. Ry. Co., 3 Wash. 659, 29 Pac. 346;
Atherton vs. Tacoma R. & P. Co., 30 Wash. 395, 71 Pac. 39;
Cowie vs. Seattle, 22 Wash. 659, 62 Pac. 121;
Price vs. Gabel, 162 Wash. 275, 298 Pac. 444.

Likewise, the Supreme Court of Washington has held to be reversible error language such as "which contributed in any measure."

Rainier Heat & Power Co. vs. Seattle, 113 Wash. 95, 193 Pac. 233;
Danielson vs. Carstens Packing Co., 121 Wash. 645, 210 Pac. 12.
Price vs. Gabel, 162 Wash. 275, 298 Pac. 444.

Appellee cites the case of *Davis vs. Falconer,* 159 Wash. 230, 292 Pac. 424, where the court held the words, "any negligence," to be not reversible error. We submit that there is a vast difference between the words, "any negligence," and the words, "negligence in any degree."

4. APPELLEE'S ANSWER TO SPECIFICATION OF ERROR VIII (Appellee's Br. pp. 40-41)

This specification of error was based upon the refusal of the District Judge to give appellant's requested instruction to the effect that if the jury should find that there was no salt car being unloaded on Track 13 at the time of Stintzi's injury their verdict must be for the defendant (Tr. 36-37). Appellee insists in defense of the action of the District Judge in refusing this request, that the jury was entitled to find Stintzi not contributorily negligent even if there was no salt car on Track 13. We again submit, however, that the claim of Stintzi that a salt car was being unloaded at the time he went between the standing cars furnished his sole possible excuse for his dangerous conduct. An examination of his testimony will show that this was the only excuse that he himself advanced for doing what he did, testifying that he felt the alleged presence of the salt car was insurance that the cars would not be moved. We again submit that, if a salt car was not present, reasonable minds could not possibly differ on the subject of the grossly negligent nature of his own decision to cross between the standing cars and that under the facts of this case the requested instruction was fully warranted and it was imperative that the District Judge give it to assure a fair trial to appellant in view of the most conclusive nature of the testimony offered by appellant, by its records and by the testimony of Mr. Fincher, that there was no such salt car being unloaded at the time, or at any other time that day.

5. CONCLUSION

Neither appellee's brief nor the record discloses any acts or conduct of appellant railway company implying a license, or beyond that an invitation, to Addison-Miller employees to cross Track 13 in any manner, least of all by crawling beneath the couplings of standing cars. Likewise, appellee has cited no case where one was ever held to be an invitee while crawling beneath couplings, and we are certain that there can be no such case.

Accepting everything that is said in appellee's brief, we would still insist that Stintzi could not have been an invitee while engaged in the unreasonable and dangerous expedient of crawling beneath the couplings of these cars, and in this connection we again point to the following quotation appearing in *Hansen vs. Lehigh Valley Ry. Co.,* 120 Fed. (2d) 498,

> "When you invite a person into your house to use the staircase you do not invite him to slide down the bannisters."

It is our earnest belief that this judgment should be reversed and the action ordered dismissed.

Respectfully submitted,

LEO N. CASHATT
JEROME WILLIAMS
FRANCIS J. McKEVITT
1121 Paulsen Building
Spokane, Washington
Attorneys for Appellant.